



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600, 648, 660, and 679

[Docket No. 211110-0228]

RIN 0648-BJ33

Establish National Minimum Insurance Standard for National Marine Fisheries Service Programs that Permit or Approve Observer Providers

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS is proposing to establish a uniform, nationally consistent minimum insurance standard that would apply in regional regulatory programs that authorize an observer provider to deploy a person in any mandatory or voluntary observer program and that specify responsibilities of authorized providers. NMFS has concluded that this action is necessary to clarify the types of insurance that are appropriate to address the financial risks that observer coverage presents in any federally managed fishery that is subject to observer coverage. The proposed standard would establish a nationally consistent suite of insurance coverages that an observer provider seeking authorization, or that has been authorized, must have to mitigate the financial risks associated with providing observer services; specifically observer deployments to fishing vessels or shoreside locations such as processing facilities, and those that arise with training personnel for these deployments. Through compliance with this minimum standard, observer providers would be properly insured, thereby mitigating the financial risks that fishing vessels, first receivers, and shoreside processors have when complying with observer coverage requirements. This proposed rule would also revise regional observer program regulations to reference the newly established national minimum insurance standard, but existing regional

observer program regulatory procedures that specify how an observer provider demonstrates compliance with insurance requirements would not be modified.

DATES: Interested persons are invited to submit comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments on this document, identified by **FDMS Docket Number NOAA-NMFS-2019-0142** by either of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter *NOAA-NMFS-2019-0142* in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Mail: Submit written comments to Dennis Hansford, 1315 East West Highway, Room 12506, Silver Spring, MD 20910.

Fax: (301) 713-4137; Attn: Dennis Hansford.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Dennis Hansford, 301-427-8136 or dennis.hansford@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1801 *et seq.*, establishes a national program for conservation and management of fishery

resources within the United States Exclusive Economic Zone (EEZ). *See id.* 1801(a)(6), 1811(a). NMFS, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries under the MSA, in conjunction with eight regional fishery management councils (Councils) established under the Act. *See id.* 1852(a). Each Council has authority to develop fishery management plans (FMPs) for fisheries in a specific geographical area and to deem proposed regulations that are necessary for plan implementation. *See id.* 1852(a), (c).

Collection of information on fishing and fish processing, such as type and quantity of fishing gear used, catch in numbers of fish or weight thereof, fishing locations, and biological information, are critical to effective fishery management. *See id.* 1853(a)(5). To obtain this information, the MSA authorizes, among other things, that an FMP may require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery. *See id.* 1853(b)(8). The MSA defines the term “observer” as any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act. *See id.* 1802(31). This definition would thus cover persons referred to in FMPs and regulations as “observers” as well as “catch-monitors” or “at-sea monitors.”

In 2018, 54 fisheries subject to management under an FMP were monitored by observer programs. To carry out required observer coverage, NMFS administers 14 observer programs (referred to as NMFS Regional Observer Programs or NMFS Observer Programs) that operate in the agency’s five regions. These programs train and deploy observers, establish information collection protocols, establish risk mitigations, and debrief observers following deployment to provide quality control on information that observers collect. While observers most frequently are deployed under the MSA to collect information on vessels that are catching, taking, or harvesting fish or attempting to do so, observers also are deployed to motherships, first receivers,

and shoreside processing facilities. NMFS' regional observer programs deploy catch-monitors and at-sea monitors to collect vessel catch or bycatch information and to ensure accurate catch accounting, reduce uncertainty of bycatch estimates, provide information for fishery assessments, or address other fishery information purposes. In this proposed rule, the term "observer" refers to a person who is deployed as an observer, a catch or at-sea monitor on a fishing vessel or mothership, or as an observer deployed to a shoreside first receiver location or processing facility. Also, in the preamble of this proposed rule, NMFS refers to a company that provides observer or catch monitor or at-sea monitor services as an "observer provider."

At present, all at-sea and shoreside observer deployments for NMFS observer programs are staffed by observer providers. These companies provide observer staffing support under two distinct models: 1) direct service, where the NMFS observer program contracts with an observer provider and oversees the provider's services based on the terms of the contract; and 2) industry-funded service, where the observer provider provides services directly to a vessel or a fleet of vessels, and a NMFS regional observer program oversees the provision of those services based on requirements set forth in NMFS regulations.

In the North Pacific and most West Coast programs, an observer provider must be permitted under the programs' regulations and satisfy other responsibilities specified in regulations in order to provide services in either the direct contract model or industry-funded model. The permitting and regulatory responsibilities for the North Pacific Observer Program are codified at 50 CFR 679.52, while those for West Coast programs are codified at 50 CFR 660.16 (Groundfish observer program), 50 CFR 660.17 (Catch monitor program), 50 CFR 660.18 (Observer and catch monitor provider permits and endorsements), 50 CFR 660.140 (Shorebased Individual Fishing Quota (IFQ) Program), 50 CFR 660.150 (Mothership Cooperative Program), and 50 CFR 660.160 (Catcher Processor Cooperative Program).

In the Northeast/Mid-Atlantic region an observer provider must be approved to provide services in the At-sea sampler/observer coverage (formally entitled Monitoring coverage)

codified at 50 CFR 648.11(h) or at-sea monitoring services in the Northeast Multispecies sector program codified at 50 CFR 648.87(b)(4).

The Southeast, Southwest, and Pacific Islands programs use only the direct contract model, and do not have regulations to authorize a company to deploy observers in their programs through an approval or permit process. Nor do these programs have regulations that specify observer provider responsibilities. Further information about NMFS' regional observer programs is available at <https://www.fisheries.noaa.gov/topic/fishery-observers>.

Observer Coverage and Financial Risks

The 2017 Bureau of Labor Statistics, Census of Fatal Occupational Injuries ranks commercial fishing as one of the most dangerous occupations. Because most observers are deployed to fishing vessels or motherships, observers' risk of occupational injury is on par with that of commercial fishermen. All observer deployments, whether at-sea or shoreside, involve exposure to natural elements, physical labor, and proximity to mechanical equipment. Given the work environment in which observers are deployed and the duties they perform, observer coverage presents heightened financial risks for observer employers and the fishing vessels and shoreside processors that are subject to observer coverage. Additionally, observer training for deployments occurs in the same environment and involves simulation of the same duties with the same equipment as an actual deployment. Thus, the financial risks presented in training observers for deployments are the same as those presented by actual deployments.

Following is a summary of the financial risks presented by observer coverage for observers; owners of vessels, first receivers, and shoreside processing facilities subject to coverage; and observer providers.

1. Observers incur risks associated with occupational injury resulting in inability to work.
2. Vessel owners, first receivers, and shoreside processors incur risks from observer claims for compensation for incidents arising out of deployment, *e.g.*, occupational injury.

3. Observer employers incur risks from observer compensation claims for occupational injury, and from vessel/shoreside processor owner claims for damages resulting from observer negligence.

Private insurance coverages and state workers' compensation programs are traditional mechanisms to address the financial risks that observer deployments present. However, the nuances of maritime law, combined with the unique role that observers have in monitoring fishing activities, have complicated efforts to address the financial risks of observer deployment, whether through private insurance or statutory compensation programs. Since 1994, Councils and NMFS have taken various actions to address insurance issues for observer providers. In regions that do not have regulatory requirements, insurance requirements are included as part of the contracts between NMFS and the observer providers for observer coverage. These insurance requirements – whether based in regulations or contracts – differ across regions. At present, the types of insurance policies that observer providers are required to have, either by regulation or by contract, include the following:

- Maritime liability to cover seamen's claims under the Merchant Marine Act (Jones Act) and General Maritime Law;
- U.S. Longshore and Harbor Workers' Compensation Act;
- State Workers' Compensation;
- Contractual General Liability;
- Marine General Liability;
- Commercial General Liability;
- Marine Employers Liability; and
- Excess or Umbrella Coverage.

Contract-based insurance requirements vary but generally consist of Marine General Liability, Marine Employers Liability, and State Workers' Compensation policies.

Regulatory-based insurance requirements currently exist for observer providers that are permitted under the North Pacific Observer Program (50 CFR 679.52(b)(11)(vi)), the West Coast Catch Monitor Program (50 CFR 660.17(f)(1)(vii)(B)), the West Coast Shoreside IFQ Program (50 CFR 660.140(h)(5)(xi)(C)), and the West Coast Mothership Cooperative Program (50 CFR 660.150(j)(4)(xi)(B)(3)). In each of these programs, a company permitted to deploy observers must annually provide copies of certificates of insurance that name the applicable program as the certificate holder and that verify that the company has the insurance specified in the applicable regulation.

The Northeast at-sea sampler/observer coverage program insurance requirements at 50 CFR 648.11(h)(3)(vii) are included as elements of an approved program provider application. In other words, an observer provider must demonstrate evidence that it holds the insurance specified in the regulation as part of its application to become an approved provider. Likewise, as part of an application to be an approved services provider in the Northeast Multispecies sector at-sea monitoring program, a company must demonstrate that it holds insurance that NMFS deems adequate (see 50 CFR 648.87(b)(4)(i)(G)).

In addition, Congress addressed compensation for observer occupational risks through the 1996 Sustainable Fisheries Act (SFA). Pub. L. 104-297 (Oct. 11, 1996). That statute amended the MSA to deem observers to be Federal employees for purposes of Federal Employees' Compensation Act (FECA) while deployed on a vessel under the MSA or the Marine Mammal Protection Act (16 U.S.C. 1881b(c)). The extension of FECA coverage to observers deployed at-sea filled a gap in coverage for observer occupational injuries that occur at-sea.

NMFS Reevaluation of Observer Provider Insurance Requirements

Beginning in 2014, NMFS initiated a reevaluation of regional observer provider insurance requirements. This effort was prompted by a letter from Alaskan Observers, Inc. (AOI) to the North Pacific Fishery Management Council (NPFMC). In this letter, AOI provided

information supporting its position that some of the observer provider insurance requirements under the North Pacific Observer Program are excessive or inapplicable, and that there are inconsistent insurance requirements among regional observer programs. To address these issues, AOI proposed a series of amendments to the North Pacific Observer Program regulations. In a 2015 letter to the NPFMC Executive Director (2015 NPFMC Letter), NMFS agreed with AOI's position that certain insurance requirements under the North Pacific Observer Program are unnecessary; specifically, coverage for claims under the Merchant Marine Act of 1920 (also known as the Jones Act), General Maritime Law (GML), and the U.S. Longshore and Harbor Workers Compensation Act (LHWCA). To make a claim under the Jones Act, and certain claims under GML, a person must have status as a "seaman".¹ Courts in a number of jurisdictions have held that observers do not qualify as seamen and therefore have dismissed Jones Act claims filed by observers and those filed under GML that require such status. In the case of the LHWCA, a person must be within the scope of an employee for purposes of the LHWCA, which generally covers longshore workers, ship-repairers, harbor construction workers and other traditional maritime labor performed shoreside. Thus, by definition, the LHWCA does not apply to observers when they are deployed at-sea.

As part of NMFS' response to the NPFMC, it noted that the NPFMC could consider revising the North Pacific Observer Program regulations to require a Marine General Liability policy and other forms of insurance that may better address certain financial risks that observer companies have with their operations. Subsequent to issuing the 2015 NPFMC Letter, NMFS decided to reevaluate observer provider insurance requirements across all regional observer programs, rather than focus solely on revisions to the North Pacific Observer Program regulations. This expanded, national effort made sense because the Jones Act, GML, and

¹ To qualify for seaman status, a person must (1) have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which the person is employed or the duties which he or she performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

LHWCA requirements deemed unnecessary in that program also apply in the West Coast programs. In addition, a broader national evaluation would enable NMFS to address the lack of consistency on insurance requirements among regional observer programs. In 2016, NMFS held an Observer Provider Insurance Workshop to discuss the efficiency of observer provider insurance requirements and compensation for observer occupational injuries. This workshop was attended by insurance experts, observer providers, observers, and representatives from other Federal agencies. Subsequent to the workshop, NMFS published an Observer Provider Insurance Workshop Technical Report (Tech Report), available at <http://spo.nmfs.noaa.gov/tech-memos>, which summarized the Workshop's proceedings and identified actions that NMFS could take to reform observer provider insurance requirements and facilitate compensation for observer occupational injuries. As detailed in the Tech Report and the 2015 NPFMC Letter, insurance coverages that observer providers are required to have for claims under the Jones Act and GML are inapplicable to observers as they lack seamen status or, in the case of the LHWCA, the coverage requirement is overly broad as it does not apply to observers who are deployed at-sea.

In addition, NMFS has learned that, while FECA does provide coverage for observer at-sea injuries, the compensation formula under FECA does not take into consideration overtime pay. Observers typically work 12-16 hour shifts to correspond with fishing vessel crew shifts, so they often do not receive full compensation for occupational injury claims under FECA.

NMFS' findings based on its national reevaluation of regional observer program insurance requirements are illustrated in the following tables.

Table 1. Applicability of Remedial Authorities to Observers

Location of observer	Jones Act seamen's claims	GML seamen's claims	LHWCA	FECA	State Workers' Compensation
On Land	Not applicable	Not Applicable	Applicable	Not Applicable	Applicable

At-Sea	Not Applicable	Not Applicable	Not Applicable	Applicable per MSA 403(c)	Applicable, but may be limited to injuries sustained within state jurisdiction
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Table 2. Comparison of regional observer program insurance requirements

Program	Jones Act/GML seamen's claims coverage	LHWCA	State Worker's Compensation (WC)	Marine Employer's Liability (MEL)	Commercial General Liability (CGL)
North Pacific	Required \$1 million minimum coverage	Required \$1 million minimum coverage	Must meet requirements within state of operation	Not required	Required -- no minimum established
West Coast	Not required	Required \$1 million minimum coverage	Must meet requirements within state of operation	Not required	Required -- no minimum established
Northeast	Not required	Not required	Required - \$5 million combined minimum for MEL and WC	Required -- \$5 million combined minimum for MEL and WC	Not required

To address these issues, the Tech Report recommended that NMFS explore replacing the divergent regional insurance requirements with a consistent, nationally applicable minimum insurance standard. Considering the highly technical nature of maritime insurance and insurance markets in general, the Tech Report recommended that NMFS first gather more information on the types of insurance and minimum dollar coverage amounts for the financial risks that observer coverage presents. To do so, NMFS published a Request for Information (RFI) on National Reform of Regional Observer Provider Insurance Requirements (83 FR 32829, July 16, 2018). In this RFI, NMFS asked observer providers, maritime insurance experts, observers, and the public at large for information on the types of insurance and associated minimum dollar amounts that would be appropriate to address observer coverage financial risks across all regional programs and in the different contexts in which observers are deployed, *i.e.*, at-sea and shoreside.

Minimum Insurance Standard for Observer Providers

NMFS proposes requiring a specific suite of insurance policies, the elements of which are described below. The proposed standard is based on an intensive, multiyear effort to identify policies and associated coverage amounts that would best address the financial risks of observer provider operations. Specifically, to develop the proposed minimum insurance standard, NMFS relied on the analysis and conclusions set forth in the 2015 NPFMC Letter, and public input that NMFS obtained through the 2016 Workshop and the 2018 RFI. Additionally, to gain further insight on the fishing industry and observer providers, NMFS coordinated with the regional FMCs in the North Pacific, West Coast, and New England and conducted lengthy informal phone interviews with each observer provider that operates an industry-funded program in those regions. NMFS then reached out to insurance brokers who offer specialized products for maritime employers, including observer providers. Through these extensive outreach efforts, and its own internal research and analysis, NMFS identified only one suite of insurance policies that would address the financial risks of observer provider operations. NMFS does not believe there is any other information available upon which it could reach a different conclusion.

NMFS specifically notes that the insurance standard reflects two points that it made in the 2015 NPFMC Letter. First, this standard does not include coverages for seamen's claims under the Jones Act and those made under GML because observers do not have seamen's status under those authorities. Second, the standard clarifies that the LHWCA applies to observers only when they perform duties shoreside because that authority applies only to shoreside incidents. Based on input from maritime insurance experts, the requirement to obtain LHWCA coverage would apply only in those jurisdictions that require it.

NMFS believes that this suite of insurance policy coverages and associated coverage amounts would set a nationally consistent minimum level of insurance that is appropriate to address the financial risks that observer providers have in providing observer services. NMFS believes this suite of insurance policy coverages would help to mitigate the financial risks that observer deployments present for fishing vessels, first receivers, and shoreside processors that

are subject to coverage. Additionally, this proposed minimum insurance standard would provide observers who are injured during their period of employment as an observer with appropriate compensation safeguards.

Elements of Proposed Minimum Insurance Standard

Marine General Liability (MGL) Policy at \$1 Million for Each Occurrence

This policy would cover an observer provider for bodily injury and property damage liability caused by their observers' conduct while deployed. By ensuring that an observer provider is covered for liability risks arising from the deployment of its observers, an MGL policy would mitigate financial risks for vessel owners and shoreside processors that are subject to observer monitoring. Based on input from marine insurance experts obtained through the RFI, NMFS found that an MGL policy would provide coverage for a range of marine liability exposures and thus is preferable to a CGL policy presently required under the North Pacific regulations and the West Coast regulations. NMFS proposes coverage at \$1 million per occurrence, as recommended by input from marine insurance experts.

In addition, unlike a CGL policy, an MGL policy can be enhanced with an endorsement that extends protection to vessel or shoreside processor owners from legal actions filed by an observer. That endorsement, however, is discretionary and not required as part of the proposed minimum insurance standard. NMFS believes the risks of observer-initiated legal actions against parties other than their employer are low, and any risks of such actions should be addressed through a Marine Employer's Liability policy, discussed below. Nonetheless, NMFS specifically requests comment on whether an MGL endorsement for legal actions brought against a vessel owner or shoreside processor should be an element of the minimum insurance standard.

Marine Employer's Liability (MEL) Policy with a Death on the High Seas Act Endorsement at \$1 Million for Each Occurrence

An MEL policy is appropriate for observer providers to cover certain claims that an observer can make for incidents that occur at-sea. These claims include General Maritime Law

(GML) remedies of Unseaworthiness, Wrongful Death, Transportation, Wages, Maintenance and Cure, and claims under the Death on the High Seas Act. An MEL policy would also cover a seaman's negligence lawsuit filed by an observer under the Jones Act. As explained above, NMFS 2015 NPFMC Letter reflected the consensus view among Federal courts that observers are not seaman for purposes of the Jones Act. Nonetheless, this does not preclude an observer from filing a Jones Act claim. An MEL policy would cover an observer provider's costs defending against a Jones Act claim, and a vessel owner's defense costs if named as a party to the Jones Act action.

NMFS proposes that an MEL policy provide coverage at \$1 million per occurrence. This amount is based on recommended input from marine insurance experts obtained through the 2018 RFI. Because an MEL policy covers claims for at-sea incidents, the proposed minimum standard provides that the MEL policy be required only for approved or permitted observer providers that deploy observers at-sea.

State Workers' Compensation Policy

A state workers' compensation policy would cover injuries that an observer sustains while deployed shoreside. The proposed minimum insurance standard would include this policy as required by the state(s) in which a company deploys observers.

U.S. Longshore and Harbor Workers' Compensation Act (LHWCA) Coverage at Statutory Limits

Coverage for LHWCA claims would provide insurance for injuries that an observer sustains while deployed shoreside. While the LHWCA does not apply to observers when they are at-sea, claims under the LHWCA for injuries sustained shoreside have been paid in some jurisdictions. The LHWCA compensation formula yields better benefits for observers than coverage that is available under state workers' compensation. Thus, it is important to include LHWCA coverage in the insurance standard, given that observers deployed as dockside monitors or to shoreside facilities perform all of their duties shoreside. In addition, observers deployed at-

sea begin their deployments by traveling to the point of embarkation on land and perform some duties shoreside prior to embarking.

The proposed minimum insurance standard includes LHWCA coverage as a stand-alone policy, or as an endorsement to a company's state workers' compensation policy. Under the proposed minimum standard, either a stand-alone policy or a policy endorsement for LHWCA coverage would be required only if LHWCA coverage is required in a state where the company deploys observers. If required under state law, NMFS proposes that the LHWCA policy or policy endorsement provide coverage at the LHWCA's claim limits.

Excess or Umbrella Coverage Over the MGL Policy or MEL Policy Limits of Not Less Than \$2 Million

To insure against events that may exceed the single event limits under an MGL policy or an MEL policy, NMFS has included in the minimum standard excess or umbrella coverage at not less than \$2 million.

Scope of Coverage

The primary purpose of all elements of the proposed minimum insurance standard is to address the specific financial risks presented by the full scope of an observer's employment to include deployment, which includes travel to the vessel or facility to be observed, and training for deployments. Therefore, under the proposed minimum standard, insurance must extend to observer injury, liability, and accidental death during their period of employment, to include training.

Proposed Action

NMFS proposes that this suite of required insurance policy coverage and associated coverage amounts be codified at 50 CFR 600.678 as a minimum national standard for NMFS regional observer programs that permit or otherwise approve an observer provider to deploy a person in any mandatory or voluntary observer program and that specify authorized provider responsibilities. NMFS further proposes that the current insurance requirements for observer

providers specified in the following regional regulations be removed and replaced with a reference to the proposed minimum insurance standard (50 CFR 600.678):

- **North Pacific**

- North Pacific Observer Program, 50 CFR 679.52(b)(11)(vi);

- **West Coast**

- West Coast Catch Monitor Program, 50 CFR 660.17(f)(1)(vii)(B);
- West Coast Shore Side IFQ Program, 50 CFR 660.140(h)(5)(xi)(C);
- West Coast Mothership Cooperative Program, 50 CFR 660.150(j)(4)(xi)(B)(3);

- **Northeast**

- Northeast at-sea sampler/observer coverage program, 50 CFR 648.11(h)(3)(vii);
- and
- Northeast Multispecies sector at-sea monitoring program, 50 CFR 648.87(b)(4)(i)(G).

Table 3. Regional program insurance requirements that would result from the proposed action.

Program	Jones Act/GML seamen's claims coverage	LHWCA	State Worker's Compensation Coverage (WC)	Commercial General Liability (CGL)	Marine General Liability (MGL)	Marine Employer's Liability (MEL)	Excess or Umbrella Coverage
North Pacific Current	Required \$1 million coverage	Required \$1 million coverage	Must meet requirements within state of operation	Required – no minimum established	Not required	Not required	Not required
North Pacific Proposed Rule	Not required	\$1 million per occurrence coverage if required under applicable state law	No change	Not required	Required \$1 million per occurrence	Required \$1 million per occurrence	Required \$2 million
West Coast Current	Not required	Required \$1 million coverage	Must meet requirements within state of operation	Required – no minimum coverage established	Not required	Not required	Not required
West Coast Proposed rule	No change	\$1 million per occurrence coverage if required under applicable state law	No change	Not required	Required \$1 million per occurrence	Required \$1 million per occurrence	Required \$2 million
Northeast Current	Not required	Not required	Required \$5 million combined minimum coverage for MEL and WC	Not required	Not required	Required \$5 million combined minimum coverage for MEL and WC	Not required
Northeast Proposed rule	No change	\$1 million per occurrence coverage if required under applicable state law	Must meet requirements within state of operation	No change	Required \$1 million per occurrence	Required \$1 million per occurrence	Required \$2 million

Each of these regional regulatory programs already include procedures to monitor and confirm observer provider compliance with current insurance requirements. This action would not change these procedures, and they would apply to monitor and confirm observer provider

compliance with the proposed minimum standard. Compliance with a minimum standard that is made final through a rulemaking would be required during the next insurance certification for the relevant program, or six months after promulgation of the final rule, whichever is later. We expect that this will provide sufficient time for providers to work with their insurance broker on getting the appropriate coverages.

The current regulations for the West Coast Catcher Processor Program (50 CFR 660.160) are unclear on whether they include insurance requirements for permitted observer providers. NMFS takes this opportunity clarify that those regulations do include insurance requirements. Therefore, as with other programs that have insurance requirements, this proposed rule would add a reference to the minimum insurance standard to the regulatory provisions regarding responsibilities for permitted observer providers that deploy observers in this program and procedures for demonstrating compliance with those standard. It would also require that an observer provider that is permitted to deploy observers in the West Coast Catcher Processor Program would demonstrate compliance with the minimum insurance standard by submitting copies of "certificates of insurance," which name the Northwest Fisheries Science Center Observer Program manager as the "certificate holder," to the Observer Program Office by February 1 of each year. In addition, these certificates of insurance must verify all coverage provisions specified in the national minimum insurance standard regulations, and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled. This procedure for demonstrating compliance with insurance requirements is the same as that which applies in other West Coast observer programs that currently specify insurance requirements for permitted observer providers and this proposed rule clarifies that it also applies in the West Coast Catcher Processor Program.

The proposed minimum national insurance standard would promote effective operation of regional observer programs by ensuring that observer providers have a consistent suite of insurance policy coverages that properly addresses the financial risks of their operations,

regardless of the fishery observed or the region in which the provider operates. For these reasons, NMFS has concluded that this action is necessary to carry out FMP monitoring requirements performed by observers, and, as such, is authorized under MSA 305(d), 16 U.S.C. 1855(d).

As stated above, the Southeast, Southwest, and Pacific Islands observer programs are currently serviced only under the direct contract model and do not have regulations for authorizing a company to deploy observers in their programs, or regulations that specify observer provider responsibilities. For these programs, NMFS intends to require the national minimum insurance standard (50 CFR 600.678), as finalized, as a condition of direct contracts for observer provider services. This would be carried out through the National Oceanic and Atmospheric Administration's, Acquisitions and Grants Office Policy Manual and not as a separate rulemaking.

Given the technical nature of insurance policies that are applicable to observer programs, NMFS seeks detailed public comments on whether each type of insurance required in the proposed minimum national insurance standard, and associated policy coverage amounts, adequately addresses observer deployment risks for vessels, observer providers, and observers. NMFS emphasizes that, in proposing minimum insurance standard, NMFS is establishing a floor, not a ceiling, for the appropriate insurance policy types and levels of associated insurance policy coverage amounts to address the financial risks of observer deployment. This proposed rule would not prevent an observer provider from choosing to have insurance or coverage amounts that exceed the proposed minimum insurance standard. Nor would this proposed rule preclude a region from initiating a separate and distinct rulemaking that requires insurance types or coverage amounts beyond that which is provided under the proposed minimum standard in this proposed rule.

Private Insurance Options to Address Gap in FECA Coverage

NMFS takes this opportunity to address other information obtained through the 2018 RFI that it considered when developing the proposed minimum insurance standard. In the 2018 RFI, NMFS presented a series of questions about FECA coverage that applies to observers when deployed at-sea under the MSA. Information obtained through the 2018 RFI showed that there is a gap in FECA coverage; specifically FECA wage-loss benefits do not include consideration of overtime pay. One observer provider reported that they were able to address that gap by supplementing their MEL policy to provide their observers with additional benefits. This form of an MEL policy, however, is customized to the operations of that provider and is not a policy that could form the basis of a policy that all providers must have. Therefore, NMFS decided not to require this form of an MEL policy in the proposed national insurance standard.

However, recognizing the implications of the gaps in FECA coverage for observers, NMFS encourages observer providers to consider obtaining this form of an MEL policy or a separate insurance policy that would provide observers with compensation that is not provided under FECA.

Classification

NMFS issues this proposed rule pursuant to Magnuson-Stevens Act (MSA) section 305(d), which provides the Secretary of Commerce with general responsibility to carry out any FMP or FMP amendment, and to promulgate regulations as may be necessary to discharge such responsibility (16 U.S.C. 1855(d)). The NMFS Assistant Administrator has determined that this proposed rule is consistent with the MSA and other applicable laws, subject to further consideration after public comment.

NEPA Determination

NOAA's Policy and Procedures for Compliance with the National Environmental Policy Act (NEPA) and Related Authorities (NOAA Administrative Order 216-6A and Companion Manual for NAO 216-6A) establishes that all NOAA major Federal actions be reviewed with respect to environmental consequences on the human environment. NOAA Administrative Order

216-6A and Companion Manual for NAO 216-6A were used to examine this proposed rule for its potential to impact the quality of the human environment and it concluded that it would not have a significant adverse effect, individually or cumulatively, on the human environment and does not involve any extraordinary circumstances listed in the Companion Manual for NAO 216-6A. Further, NMFS determined that this proposed rule may appropriately be categorically excluded from the requirement to prepare either an environmental assessment or environmental impact statement in accordance with the categorical exclusion described in the Companion Manual for NAO 216-6A, G7, which applies to preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis.

Executive Order 12866

This proposed rule has been determined to be significant for purposes of Executive Order 12866.

Regional regulatory programs that authorize an observer provider to deploy a person in any mandatory or voluntary observer program and that specify responsibilities of authorized providers already include insurance requirements. Thus, to operate in these programs, observer providers already must demonstrate that they have the insurance specified in the applicable regulations.

Due to the nuances of maritime law and the unique nature of observer deployments, regions have adopted differing insurance requirements that are in some cases overly burdensome and inefficient. This action would provide a national standard that clarifies the types and amounts of insurance and associated coverage amounts that best address the financial risks of observer provider operations regardless of the fishery or region in which an observer provider operates. In some cases, compliance with the proposed national insurance standard would

require observer providers to have insurance that is different from what they are required to have under current regulations. While this proposed action would change the suite of insurance that observer providers are required to have, it does not make substantive increases to the insurance that is required in current regional programs. In fact, the proposed action makes clarifications that would result in observer providers not being required to have coverages for seaman's claims under the Jones Act and General Maritime Law.

For these reasons, we do not expect this action to result in a significant increase in the premiums that observer providers currently pay. In fact, the action could result in lower premiums because it would establish a national standard that does not include certain coverages that are required under current regulations. Additionally, the increased efficiency of a national standard may bring about lower premiums. NMFS invites public commenters to provide information that could inform these assumptions.

Paperwork Reduction Act

This action does not contain a change to a collection-of-information requirement for purposes of the Paperwork Reduction Act. NMFS' regional observer program regulations that authorize observer providers or that specify authorized provider responsibilities already include procedures for demonstrating compliance with program insurance requirements, and this proposed rule would not change those procedures. The following existing collection of information requirements would continue to apply, under the following control numbers: (1) 0648-0318, Alaska Observer Program (applies to the North Pacific Observer Program); (2) 0648-0500, An Observer Program for At-Sea Processing Vessels in the Pacific Coast Groundfish Fishery; and (3) 0648-0546, Northeast Region Observer Providers Requirements. Note that, while this action would make clear that the existing regulations for the West Coast Catcher Processor Program (50 CFR 660.160) include insurance requirements for permitted observer providers (by adding a reference to the minimum insurance standard to the program's regulations), the collection of an insurance certificate from observer providers that are permitted

to operate in this program is already covered under the existing control number 0648-0500, An Observer Program for At-Sea Processing Vessels in the Pacific Coast Groundfish Fishery.

Initial Regulatory Flexibility (IRFA) Analysis

Pursuant to Section 603 of the Regulatory Flexibility Act (RFA), NMFS has prepared an IRFA to analyze the potential impact that this rule, if adopted, would have on small entities. The RIR and IRFA are available for public review (see ADDRESSES). A summary of the IRFA follows.

Description of the Reasons Why Action Is Being Considered

The policy reasons for issuing this proposed rule are discussed previously in the preamble of this document, and are not repeated here.

Statement of the Objectives of, and Legal Basis for, the Proposed Rule; Identification of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The objective of this proposed rule is to promote effective operation of regional observer programs by ensuring that observer providers have a nationally consistent suite of insurance coverages that properly addresses the financial risks of their operations, regardless of the fishery observed or the region in which the provider operates. The legal basis for this proposed rule is 16 U.S.C. 1855(d). No other Federal rules duplicate, overlap, or conflict with this proposed rule.

Number and Description of Small Entities Regulated by the Proposed Action

Currently, there are six companies that provide observer services in a NMFS mandatory or voluntary observer program. These entities, which would be directly regulated by the proposed action, include: A.I.S. Inc.; Alaskan Observers, Inc.; Saltwater, Inc.; TechSea International; Fathom Resources LLC; and East West Technical Services, LLC. Four of these entities operate in the North Pacific Observer Program. Three operate in the West Coast Observer Program, and two operate in the Northeast Observer Program. The specific NMFS regional observer programs in which these companies may be permitted or approved to deploy observers are as follows: the North Pacific Observer Program, 50 CFR 679.52; the West Coast

Groundfish Observer Program, 50 CFR 660.16; the West Coast Catch Monitor Program, 50 CFR 660.17; the West Coast Groundfish Observer and Catch Monitor Provider Permits Program, 50 CFR 660.18; the West Coast Shoreside IFQ Program, 50 CFR 660.140; the West Coast Mothership Cooperative Program, 50 CFR 660.150; the West Coast Catcher Processor Cooperative Program, 50 CFR 660.160; the program for Northeast at-sea sampler/observer coverage, 50 CFR 648.11(h); and the Northeast Multispecies at-sea sector monitoring program, 50 CFR 648.87(b)(4). The information available to NMFS indicates that the principal activity of most of these companies is providing observers. All of the current observer provider companies are considered small entities under the RFA.

Additionally, firms interested in obtaining approval or a permit to provide observer services under a NMFS regional observer program in the future would be regulated under the proposed action. Observer provider services are a specialized area, and NMFS does not know how many other firms might want to become providers in the future. In any event, NMFS anticipates that any new providers would be considered small entities. For purposes of the RFA, NMFS established a small business size standard (NAICS 11411) for all businesses in the commercial fishing industry including their affiliates, whose primary industry is commercial fishing. (See 80 FR 81194; 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all of its affiliated operations worldwide. Based on available information, NMFS has determined that all six of these companies are small entities, *i.e.*, they are engaged in the business of fish harvesting (NAICS 11411), are independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of \$11 million.

Even though this proposed action would apply to a substantial number of the relevant businesses, the implementation of this action would not result in a significant adverse economic

impact on individual companies. As described below, the proposed action could result in possible changes in insurance costs for these companies, ranging from an increase of approximately \$10,000 to an approximate decrease of a similar amount. This range includes potential benefits to the companies stemming from clarifying requirements and allowing them to drop certain insurance policies that are no longer necessary.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

This proposed rule does not include new reporting, recordkeeping, or other compliance requirements. As noted under the Paperwork Reduction Act header above, NMFS' regional observer program regulations that authorize observer providers or that specify authorized provider responsibilities, already include procedures for demonstrating compliance with program insurance requirements, and this proposed rule would not change those procedures.

Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

As required by 5 U.S.C. 603(c), NMFS' analysis considered whether there are any significant alternatives to the proposed rule that would accomplish its stated objectives while minimizing any significant economic impact on small entities. To identify alternatives, NMFS took several information gathering actions. In 2016, NMFS held an Observer Provider Insurance Workshop (2016 Workshop), which was attended by marine insurance experts, observer providers, observer representatives, and officials from relevant Federal and state agencies. Additionally, in 2018, NMFS issues a Request for Information (2018 RFI) in which it asked for input on an appropriate suite of insurance and associated coverage amounts for observer providers (83 FR 32829, July 16, 2018). Through this engagement, NMFS identified no alternatives to the proposed rule that would reasonably address the unique risks that observer coverage presents for observer providers, observers, and the industry that is subject to observer

coverage requirements. Therefore, NMFS analyzed only whether the proposed rule would have a significant adverse economic impact on observer providers, all of which are small entities. The question of whether this proposed rule would have a significant economic impact on the small entity observer providers depends upon whether carrying the required policies under the minimum national standard would result in increased premiums compared to the premiums that observer providers currently pay to comply with existing regional requirements. However, as described below, NMFS lacks the precise baseline information on existing premium costs that is necessary to determine, with any specificity the economic impact that may result from the proposed rule. NMFS attempted to obtain baseline information on current observer provider insurance premium costs through outreach to the six companies that provide observer services in a NMFS mandatory or voluntary observer program. However, these companies viewed insurance cost information as proprietary, and, therefore, declined to provide details of their insurance costs or estimates of what premium costs would be to comply with the proposed national minimum standard. Nonetheless, based on the limited information that these companies did provide, NMFS estimated that current observer provider insurance premiums cost less than \$5,000 per employee. It is possible that the proposed rule could result in a decrease of premiums from the estimated \$5,000 per employee baseline, due to cost savings from lower premiums, from the consolidation of policies, or from the cancellation of policies that are no longer necessary. It is also possible for a premium increase to an outer bound of \$10,000 per employee if a company previously had no policy coverage at all. Using these general assumptions, NMFS developed ranges in observer provider premium changes that could result upon implementation of the proposed rule (see table below).

To form an accurate assessment of the economic impact that may result from the proposed rule, NMFS requests comment on the ranges described below. NMFS is seeking comments on two aspects of these premium ranges. Specifically, NMFS would like comments on whether the magnitude of the ranges described below accurately captures the likely premium

changes that may result from the proposed rule. In addition, NMFS would like comments on which of these ranges is most likely to apply, should the proposed rule be finalized.

Proposed Action Estimated Ranges of Observer Provider Premium Changes

Insurance Premium Increases	Insurance Premium Decreases
\$0 to \$2,500 per employee	\$0 to \$2,500 per employee
\$2,500 to \$5,000 per employee	\$2,500 to \$5,000 per employee
\$5,000 to \$7,500 per employee	\$5,000 to \$7,500 per employee
\$7,500 to \$10,000 per employee	\$7,500 to \$10,000 per employee

List of Subjects

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fish, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Statistics.

50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

50 CFR Part 660

Fisheries, Fishing, Indians, Recreation and recreation areas, Reporting and recordkeeping requirements, Treaties.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: November 16, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NOAA proposes to amend 50 CFR parts 600, 648, 660, and 679 as follows:

PART 600 -- MAGNUSON-STEVENSON ACT PROVISIONS

1. The authority citation for 50 CFR part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. In subpart H, add § 600.748 to read as follows:

§ 600.748 National Minimum Observer Provider Insurance Standard.

(a) *Applicability.* As part of regulations for observer provider companies to obtain approval or a permit to deploy a person in any mandatory or voluntary observer program, or regulations that specify approved or permitted observer provider responsibilities, NMFS must reference and ensure compliance with the following national minimum insurance standard.

(b) *Policies and Coverage Amounts.* (1) Marine General Liability (\$1 million any one occurrence).

(2) Marine Employers Liability (\$1 million any one occurrence) for an observer provider that is authorized, or has applied to be authorized, to deploy observers or monitors at-sea.

(3) State workers' compensation as required by each state in which the observer provider is authorized, or has applied to be authorized, to deploy observers or monitors at-sea or shoreside.

(4) U.S. Longshore and Harbor Workers' Act coverage, either as a stand-alone policy or as a state workers' compensation policy endorsement, if that policy or a policy endorsement is

required by the respective state(s) in which the observer provider is authorized, or has applied to be authorized, to deploy observers or monitors at-sea or shoreside.

(5) Excess or umbrella coverage (\$2 million any one occurrence).

(c) Policy coverages. Coverage must extend to injury, liability, and accidental death during the period of employment, including training, of observers or monitors at-sea or shoreside.

PART 648 -- FISHERIES OF THE NORTHEASTERN UNITED STATES

3. The authority citation for 50 CFR part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

4. In § 648.11, revise the section heading and paragraph (h)(3)(vii) to read as follows:

§ 648.11 At-sea sampler/observer coverage.

* * * * *

(h) * * *

(3) * * *

(vii) Evidence of holding insurance specified at § 600.748(b) and (c) of this chapter.

* * * * *

5. In § 648.87, revise paragraph (b)(4)(i)(G) to read as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(G) Evidence of holding insurance specified at § 600.748(b) and (c) of this chapter.

* * * * *

PART 660--FISHERIES OFF WEST COAST STATES

6. The authority citation for 50 CFR part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*; 773 *et seq.*; 7001 *et seq.*

7. In § 660.17, revise paragraph (f)(1)(vii)(B) to read as follows:

§ 660.17 Catch monitor program.

* * * * *

(f) * * *

(1) * * *

(vii) * * *

(B) The observer provider must submit copies of "certificates of insurance," that names the Catch Monitor Program Coordinator as the "certificate holder" to the Catch Monitor Program Office by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

8. In § 660.140, revise paragraph (h)(5)(xi)(C) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(h) * * *

(5) * * *

(xi) * * *

(C) *Certificates of insurance.* The observer provider must submit copies of "certificates of insurance" that name the Northwest Fisheries Science Center Observer Program manager as the "certificate holder" to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

9. In § 660.150, add paragraph (j)(4)(xi)(A)(6), and revise paragraph (j)(4)(xi)(B)(3) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

* * * * *

(j) * * *

(4) * * *

(xi) * * *

(A) * * *

(6) *Certificates of insurance.* The observer service provider must submit copies of "certificates of insurance" that name the Northwest Fisheries Science Center Observer Program manager as the "certificate holder" to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

(B) * * *

(3) *Certificates of insurance.* The observer provider must submit copies of "certificates of insurance" that name the Northwest Fisheries Science Center Observer Program manager as the "certificate holder" to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

10. In § 660.160, add paragraph (g)(1)(iv) to read as follows:

§ 660.160 Catcher/processor (C/P) Coop Program.

* * * * *

(g) * * *

(1) * * *

(v) *Certificates of insurance.* The observer provider must submit copies of "certificates of insurance" that name the Northwest Fisheries Science Center Observer Program manager as the "certificate holder" to the Observer Program Office by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

PART 679--FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

11. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*; 1801 *et seq.*; 3631 *et seq.*; Pub. L. 108–447; Pub. L. 111–281.

12. In § 679.52, revise paragraph (b)(11)(vi) to read as follows:

§ 679.52 Observer provider permitting and responsibilities.

* * * * *

(b) * * *

(11) * * *

(vi) *Certificates of insurance.* Copies of “certificates of insurance” that name the NMFS Observer Program leader as the “certificate holder” must be submitted to the Observer Program by February 1 of each year. The certificates of insurance shall verify all coverage provisions specified at § 600.748(b) and (c) of this chapter and state that the insurance company will notify the certificate holder if insurance coverage is changed or canceled.

* * * * *

